Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

GILBERTO ALVEZ and JOSEPH VINAL
SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT JOSEPH VINAL SHIP MAINTENANCE, INC.

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Respondent Vinal is not dissatisfied with petitioner's presentation of references to opinions below and grounds on which this Court's jurisdiction is invoked.

Statute Involved

Section 33(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1440, as amended 1959, 73 Stat. 391, 33 U.S.C. 933(a):

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Questions Presented

I. If a harbor worker is tortiously injured aboard ship in U.S. territorial waters, does his wife have a general maritime law right to recover damages for her lost consortium resulting from her husband's non-fatal injury?

II. If a state court is required to answer the foregoing question and there is no controlling federal statute or decision by this Court, must the state court's answer be negative if that is the only previous answer by a federal court of appeals?

Statement

Respondent Alvez, a harbor worker, sued in New York County Supreme Court to recover damages from petitioner American Export Lines on general maritime law claims of negligence and unseaworthiness for injury which he sustained aboard petitioner's ship while docked in Brooklyn, N.Y. Petitioner impleaded Alvez' employer, respondent Joseph Vinal Ship Maintenance, Inc., for indemnity, the injury having occurred before the effective date of the

1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*

Alvez moved to amend his complaint to allege a damages claim against petitioner for his wife's lost consortium resulting from his injury. The New York County Supreme Court denied the motion (A1) on authority of *Igneri v. Cie. de Transports Oceaniques,* 323 F. 2d 257 (2 Cir. 1963), cert. den. 376 U.S. 949 (1964), which holds that such a claim does not exist under general maritime law. The Appellate Division of the New York Supreme Court reversed the denial (A4-A5), relying on *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), which holds that the widow of a deceased harbor worker has a right to recover damages under general maritime law against a shipowner for lost consortium resulting from her husband's fatal injury aboard ship while in U.S. territorial waters, and on *Pesce v. Summa Corp.,* 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (2nd Dist. 1975), holding diametrically contrary to *Igneri,* which the intermediate California Court opined, 54 Cal. App. 3d p. 92, 126 Cal. Rptr., p. 455, "has been overruled by *Sea-Land Services* [*v. Gaudet*] as construed by *Skidmore"* [*v. Grueninger,* 506 F.2d 716 (5 Cir. 1975)], the latter holding that the husband of a motorboat passenger who was killed when the boat collided with a barge can recover damages for loss of his wife's consortium, neither citing nor having any occasion to distinguish *Igneri.*

The New York Court of Appeals affirmed the Appellate Division (A8-A17), one Judge dissenting (A17-A19), in the belief that "the *ratio decendendi* of the *Igneri* decision reveals an erosion of its theoreti-

cal underpinnings so severe as to precipitate its collapse under its own weight" (A12), citing as "the law of the land" (A15) a string of state court cases which recognize a wife's statutory or common law claim for lost consortium due to her husband's injury (A12-A13, n. 4) and *Sea-Land Services, Inc. v. Gaudet,* despite being "cognizant that the Fifth Circuit has interpreted *Gaudet (supra)* as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions" (A15), referring to *Christofferson v. Halliburton Co.,* 534 F. 2d 1147, reh. en banc den. 542 F. 2d 1174 (5 Cir. 1976), which on authority of *Igneri,* "the leading case on this question of law", 534 F. 2d p. 1149, holds that the wife of a seaman injured in U.S. territorial waters has no claim for lost consortium under the Jones Act, 46 U.S.C. 688, or general maritime law.

Summary of Argument

I. The wife's lost consortium claim is precluded by LHWCA § 33(a).

II. The New York courts were constitutionally bound by *Igneri.*

Argument

I

It is axiomatic that any right by Mrs. Alvez to recover damages for her lost cosortium is governed by federal maritime law, *cf., Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372, 384 (1918); that Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in the exercise of its paramount, constitutionally derived maritime jurisdiction, *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 256-260 (1977), and cases there cited; and that New York courts are bound by LHWCA § 33(a), *cf., New York Cent., etc. v. Tonsellito,* 244 U.S. 360 (1917); *Smither and Company, Inc. v. Coles,* 242 F. 2d 220 (C. of A., D.C. 1957), cert. den. 354 U.S. 914 (1957), which in the case "of a disability or death for which compensation is payable under this chapter", grants "the person entitled to such compensation" the right to recover damages against "some person other than the employer or a person or persons in his employ".

Thus, since Mrs. Alvez is not entitled to "such compensation" for her husband's non-fatal injury, *cf.,* LHWCA §§ 8, 9, she has no right to recover damages from petitioner for her lost consortium. A similar prohibition applies to consortium damages claims by spouses of non-fatally injured seamen because of precluding Jones Act language. *Igneri,* 323 F. 2d, p. 266; *Christofferson,* 534 F. 2d, p. 1149. As in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 623 (1978), "we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us."

"Here Congress has utilized its constitutional power 'to alter, qualify, or supplement' the maritime law 'as experience or changing conditions might require,' Panama R.R. Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393-394, 68 L.Ed. 748 (1924). Its action in doing so 'must not be read in a spirit of mutilating narrowness'; the courts must give '"hospitable scope" to Congressional purpose even when meticulous words are lacking.' United States v. Hutcheson, 312 U.S. 219, 235, 61 S.Ct. 463, 467-468, 85 L.Ed. 788 (1941). We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore." *Igneri,* 323 F.2d, p. 267.

II

The New York Court of Appeals recognized that it was in the reverse *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), situation of seeking the answer to a maritime law question "obtainable solely by recourse to Federal law" (A11). Under the analogous *Erie* doctrine, *cf.,* Friendly, In Praise of *Erie,* 39 N.Y.U.L. Rev. 383, 404-405, 407 (1964), the New York Court's function was "to ascertain and apply that law even though it has not been expounded by the highest court", and the New York Court "was not at liberty to reject those decisions merely because it did not agree with their reasoning", *Fidelity Trust Co. v. Field,* 311 U.S. 169, 177, 179 (1940), or free to apply "what it considered to be the better rule", *West*

v. A. T. & T. Co., 311 U.S. 223, 235 (1940), "in the absence of convincing evidence that the highest court * * * would decide differently." *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 467 (1940).

Contravening those mandates, the New York Court sought "any established and inflexible rule barring recognition of the claim before us" (A17). That convoluted search disclosed the only then reported, unmodified federal court decision which had refused to abide *Igneri,* on the ground of conjectured obsolescence, *Giglio v. Farrell Lines, Inc.,* 424 F. Supp. 927, 930 (S.D.N.Y. 1977), app. den. (2 Cir. No. 77-8014, 2/17/77), and the *Pesce* opinion, which the New York Court found more appealingly in accord with its own rationale in *Millington v. Southeastern Elevator Co.,* 22 N.Y. 2d 498, 293 N.Y.S. 2d 305 (1968), (A12-A13). The irony of any reliance on *Pesce* which, as previously noted, misconceived that *Igneri* had been overruled by *Skidmore v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975), is that 7 months after *Pesce,* the Fifth Circuit Court of Appeals in *Christofferson* rejected the "argument that *Igneri* would now be decided differently" and distinguished its earlier decision in *Skidmore* on the ground that it "involved a wrongful death claim", 534 F. 2d, pp. 1150, 1151, n. 1.

Thus, even if LHWCA § 33(a) statutory maritime law did not prescribe Mrs. Alvez' general maritime law claim, instead of ascertaining the general maritime law by the analogous *Erie* rule so as to preserve the essential uniformity of that law and prevent the same sort of forum conflicts and consequent unequal protection of the law which motivated *Erie,* the New

York Court misguidedly searched for rogue opinions and declined to follow *Igneri* despite *Christofferson*, both of which it deemed to have been wrongly decided and eroded by "the law of the land". *Cf.*, the dissent (A17-A19).

Conclusion

The decision and judgment of the New York Court of Appeals should be reversed and the motion to amend the complaint should be denied.

Respectfully submitted,

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New York, N. Y.
January 10, 1980